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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

LOS ANGELES POLICE PROTECTIVE LEAGUE,

Petitioner,

v.

CITY OF LOS ANGELES, a municipal corporation; MICHEL R. MOORE, Chief of Police for the City of Los Angeles, and DOES 1 through 20, inclusive,

Respondents.

FIRST AMENDMENT COALITION, a California non-profit, public benefit corporation; LOS ANGELES TIMES COMMUNICATIONS LLC, a Delaware limited liability company; CALIFORNIA NEWSPAPERS PARTNERSHIP L.P., a Delaware limited partnership; THE CENTER FOR INVESTIGATIVE REPORTING, California non-profit, public benefit corporation; and CALIFORNIA NEWS PUBLISHERS ASSOCIATION, an association of California news organizations,

ACLU OF SOUTHERN CALIFORNIA and VALERIE RIVERA,

Intervenors.

Case No. 18STCP03495

REQUEST FOR JUDICIAL NOTICE; DECLARATION IN SUPPORT OF REQUEST

Judge: Mitchell L. Beckloff
Dept.: 86

Petition Filed: December 31, 2018

REQUEST FOR JUDICIAL NOTICE

In connection with the hearing scheduled for February 15, 2019, Intervenors First Amendment Coalition, Los Angeles Times Communications LLC, California Newspapers Partnership L.P., The Center for Investigative Reporting, and California News Publishers Association (collectively "Media Intervenors") respectfully request that the Court take judicial notice under California Evidence Code section 452 and 453 of the *Decision Denying Preliminary Injunctions* issued on February 8, 2019 in *Walnut Creek Police Officers' Association v. City of Walnut Creek*, No. N19-0109 (together with Nos. N19-0097, N19-0166, N19-0167, N19-0169, N19-0170 (collectively, the "Contra Costa Cases")), pending in the Superior Court of the State of California, County of Contra Costa (hereinafter, "the Contra Costa Decision"), attached hereto as Exhibit A.

Section 452(d) of the Evidence Code authorizes the Court to take judicial notice of "Records of . . . any court of this state." Cal. Evid. Code § 452(d). Pursuant to Section 452(d) of the Evidence Code, California courts may take judicial notice of court records from cases in other counties in the State of California. See, e.g., *Californians for Alternatives to Toxics v. Dep't of Pesticide Regulation* (2006) 136 Cal. App. 4th 1049, 1064 fn. 5 (taking judicial notice of court decision in litigation in another county).

The Contra Costa Decision is relevant because the court in the Contra Costa Cases considered the same legal issue as that at issue in this case: whether Penal Code § 832.7(b), as amended by SB 1421, applies to records created before January 1, 2019. That court concluded in a final decision on the merits that Penal Code § 832.7(b) applies to records created before January 1, 2019, denied petitioners' motions for preliminary injunctions, and ordered a ten-day stay of respondent public bodies' release of the disputed documents in order to give petitioners time to seek immediate relief from the Court of Appeal. While the decision of another Superior Court is not, of course, controlling, the Contra Costa Decision provides a thorough analysis of the same question presented by the actions pending before this Court. Accordingly, the Court should take judicial notice of this ruling and consider the Contra Costa Decision as persuasive authority.

DECLARATION IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE

I, Cristina Salvato, declare as follows:

1. I am an attorney with the law firm of Sheppard Mullin Richter & Hampton, counsel for the Mercury News. I have personal knowledge of the following matters and, if called as a witness, could and would testify thereto.

2. Attached hereto as Exhibit A is a true and correct copy of the *Decision Denying Preliminary Injunctions* issued by the Contra Costa Superior Court on February 8, 2019 in *Walnut Creek Police Officers' Association v. City of Walnut Creek*, No. N19-0109 (together with Nos. N19-0097, N19-0166, N19-0167, N19-0169, N19-0170).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed February 11, 2019, at Los Angeles, California.

Dated: February 11, 2019 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By _____

TENAYA RODEWALD
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Attorneys for FIRST AMENDMENT COALITION, LOS ANGELES TIMES COMMUNICATIONS LLC, CALIFORNIA NEWSPAPERS PARTNERSHIP L.P., THE CENTER FOR INVESTIGATIVE REPORTING, and CALIFORNIA NEWS PUBLISHERS ASSOCIATION

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SANTA CLARA

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Santa Clara, State of California. My business address is 379 Lytton Avenue, Palo Alto, CA 94301-1479.

On February 11, 2019, I served true copies of the following document(s) described as **REQUEST FOR JUDICIAL NOTICE; DECLARATION IN SUPPORT OF REQUEST** on the interested parties in this action as follows:

Richard A. Levine Rains Lucia Stern St. Phalle & Silver, PC rlevine@rlslawyers.com	*Attorneys for Petitioner Los Angeles Police Protective League*
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BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent from e-mail address rregnier@sheppardmullin.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 11, 2019, at Palo Alto, California.

Robin P. Regnier

Exhibit A

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF CONTRA COSTA

WALNUT CREEK POLICE OFFICERS' ASSOCIATION, Petitioner, v. CITY OF WALNUT CREEK, et al., Respondents. ACLU OF NORTHERN CALIFORNIA, et al., Intervenors/Real Parties In Interest.	Case No.: N19-0109 **TOGETHER WITH:** N19-0097 (County) N19-0166 (Concord) N19-0167 (Martinez) N19-0169 (Richmond) N19-0170 (Antioch **DECISION DENYING PRELIMINARY INJUNCTIONS**

INTRODUCTION AND SUMMARY

These six cases have been briefed and argued together, presenting the same controlling legal issue. The Court accordingly decides them together. In all six cases, the result is the same: The Court **DENIES** the motions of the petitioners for preliminary injunctions. However, the Court orders a ten-day **STAY** of respondents' release of the disputed documents (in effect continuing the existing TROs through February 18, 2019), in order to give petitioners time to seek further immediate relief from the Court of Appeal.

In a nutshell, these cases are about the legal issue of whether SB 1421, enacting a major amendment to Penal Code § 832.7, should or should not be applied to documents in police

personnel records[1] that were created prior to the effective date of the amendment (January 1, 2019).

Section 832.7 (both before and after the amendment) establishes a detailed procedure (commonly referred to as a *Pitchess* motion) for seeking to obtain personnel records of peace officers and custodial officers. The *Pitchess* procedure is quite restrictive as to what material might be sought, by whom, on what grounds, and by what procedures. The previous statute also provided that the *Pitchess* procedure was the exclusive means of seeking such personnel records. They could not, for example, be obtained through the Public Records Act Government Code §§ 6250 et seq. (PRA).[2] The result, all parties agree, was that until this year California was one of the most restrictive states in the country when it came to protecting police personnel records from public disclosure.

That landscape has changed quite considerably with the Legislature's 2018 enactment of SB 1421, effective January 1, 2019. As relevant here, SB 1421 adds a new subdivision (b) to § 832.7. The new subdivision (b) does not alter the *Pitchess* procedure; it simply bypasses it. It provides that several defined categories of police personnel records[3] "shall be made available" for public inspection under the PRA, subject to a number of restrictions stated in the subdivision. Thus, a person seeking police personnel records within the categories laid out in subdivision (b) need not proceed via a *Pitchess* motion, but may simply make a PRA request as with any other

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[1] The statute, both before and after SB 1421, speaks of personnel records of peace officers and custodial officers. For convenience of exposition, however, the Court will shorten that to "police personnel records". The scope of law enforcement personnel covered by the statute is not at issue in these cases.

[2] See *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1284-86.

[3] It is not clear whether the PRA-related provisions of the new subdivision (b) are limited to police personnel records. The relevant text speaks of "peace officer or custodial officer personnel records *and records maintained by any state or local agency*" (§ 832.7(b)(1), italics added). Arguably, therefore, subdivision (b) requires PRA disclosure of a broader range of records than were previously shielded from public examination under the prior version of the section – that is, records "maintained" by a police agency that are not personnel records. The scope of these cases, however, is limited to the effect of the amendment on police personnel records. It is therefore unnecessary to consider whether the amendment also relates to other kinds of police records.

governmental records subject to the PRA. Because the PRA does not include the numerous restrictions of the *Pitchess* procedure as to who may seek disclosure, and on what grounds, and under what limitations, the result is to open up to general public scrutiny a broad range of documents from police personnel records that were effectively unavailable to most of the public prior to this year.

The text of the new subdivision 832.7(b) is as follows:

> **(b)**
> **(1)** Notwithstanding subdivision (a), subdivision (f) of Section 6254 of the Government Code, or any other law, the following peace officer or custodial officer personnel records and records maintained by any state or local agency shall not be confidential and shall be made available for public inspection pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code):
>
> **(A)** A record relating to the report, investigation, or findings of any of the following:
>
> **(i)** An incident involving the discharge of a firearm at a person by a peace officer or custodial officer.
>
> **(ii)** An incident in which the use of force by a peace officer or custodial officer against a person resulted in death, or in great bodily injury.
>
> **(B)**
> **(i)** Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public.
>
> **(ii)** As used in this subparagraph, "sexual assault" means the commission or attempted initiation of a sexual act with a member of the public by means of force, threat, coercion, extortion, offer of leniency or other official favor, or under the color of authority. For purposes of this definition, the propositioning for or commission of any sexual act while on duty is considered a sexual assault.
>
> **(iii)** As used in this subparagraph, "member of the public" means any person not employed by the officer's employing agency and includes any participant in a cadet, explorer, or other youth program affiliated with the agency.

(C) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence.

(2) Records that shall be released pursuant to this subdivision include all investigative reports; photographic, audio, and video evidence; transcripts or recordings of interviews; autopsy reports; all materials compiled and presented for review to the district attorney or to any person or body charged with determining whether to file criminal charges against an officer in connection with an incident, or whether the officer's action was consistent with law and agency policy for purposes of discipline or administrative action, or what discipline to impose or corrective action to take; documents setting forth findings or recommended findings; and copies of disciplinary records relating to the incident, including any letters of intent to impose discipline, any documents reflecting modifications of discipline due to the Skelly or grievance process, and letters indicating final imposition of discipline or other documentation reflecting implementation of corrective action.

(3) A record from a separate and prior investigation or assessment of a separate incident shall not be released unless it is independently subject to disclosure pursuant to this subdivision.

(4) If an investigation or incident involves multiple officers, information about allegations of misconduct by, or the analysis or disposition of an investigation of, an officer shall not be released pursuant to subparagraph (B) or (C) of paragraph (1), unless it relates to a sustained finding against that officer. However, factual information about that action of an officer during an incident, or the statements of an officer about an incident, shall be released if they are relevant to a sustained finding against another officer that is subject to release pursuant to subparagraph (B) or (C) of paragraph (1).

(5) An agency shall redact a record disclosed pursuant to this section only for any of the following purposes:

(A) To remove personal data or information, such as a home address, telephone number, or identities of family members, other than the names and work-related information of peace and custodial officers.

(B) To preserve the anonymity of complainants and witnesses.

(C) To protect confidential medical, financial, or other information of which disclosure is specifically prohibited by federal law or would cause an

unwarranted invasion of personal privacy that clearly outweighs the strong public interest in records about misconduct and serious use of force by peace officers and custodial officers.

(D) Where there is a specific, articulable, and particularized reason to believe that disclosure of the record would pose a significant danger to the physical safety of the peace officer, custodial officer, or another person.

(6) Notwithstanding paragraph (5), an agency may redact a record disclosed pursuant to this section, including personal identifying information, where, on the facts of the particular case, the public interest served by not disclosing the information clearly outweighs the public interest served by disclosure of the information.

(7) An agency may withhold a record of an incident described in subparagraph (A) of paragraph (1) that is the subject of an active criminal or administrative investigation, in accordance with any of the following:

(A)

(i) During an active criminal investigation, disclosure may be delayed for up to 60 days from the date the use of force occurred or until the district attorney determines whether to file criminal charges related to the use of force, whichever occurs sooner. If an agency delays disclosure pursuant to this clause, the agency shall provide, in writing, the specific basis for the agency's determination that the interest in delaying disclosure clearly outweighs the public interest in disclosure. This writing shall include the estimated date for disclosure of the withheld information.

(ii) After 60 days from the use of force, the agency may continue to delay the disclosure of records or information if the disclosure could reasonably be expected to interfere with a criminal enforcement proceeding against an officer who used the force. If an agency delays disclosure pursuant to this clause, the agency shall, at 180-day intervals as necessary, provide, in writing, the specific basis for the agency's determination that disclosure could reasonably be expected to interfere with a criminal enforcement proceeding. The writing shall include the estimated date for the disclosure of the withheld information. Information withheld by the agency shall be disclosed when the specific basis for withholding is resolved, when the investigation or proceeding is no longer active, or by no later than 18 months after the date of the incident, whichever occurs sooner.

(iii) After 60 days from the use of force, the agency may continue to delay the disclosure of records or information if the disclosure could reasonably be expected to interfere with a criminal enforcement proceeding against someone other than the officer who used the force. If an agency delays disclosure under this clause, the agency shall, at 180-day intervals, provide, in writing, the specific basis why disclosure could reasonably be expected

to interfere with a criminal enforcement proceeding, and shall provide an estimated date for the disclosure of the withheld information. Information withheld by the agency shall be disclosed when the specific basis for withholding is resolved, when the investigation or proceeding is no longer active, or by no later than 18 months after the date of the incident, whichever occurs sooner, unless extraordinary circumstances warrant continued delay due to the ongoing criminal investigation or proceeding. In that case, the agency must show by clear and convincing evidence that the interest in preventing prejudice to the active and ongoing criminal investigation or proceeding outweighs the public interest in prompt disclosure of records about use of serious force by peace officers and custodial officers. The agency shall release all information subject to disclosure that does not cause substantial prejudice, including any documents that have otherwise become available.

(iv) In an action to compel disclosure brought pursuant to Section 6258 of the Government Code, an agency may justify delay by filing an application to seal the basis for withholding, in accordance with Rule 2.550 of the California Rules of Court, or any successor rule thereto, if disclosure of the written basis itself would impact a privilege or compromise a pending investigation.

(B) If criminal charges are filed related to the incident in which force was used, the agency may delay the disclosure of records or information until a verdict on those charges is returned at trial or, if a plea of guilty or no contest is entered, the time to withdraw the plea pursuant to Section 1018.

(C) During an administrative investigation into an incident described in subparagraph (A) of paragraph (1), the agency may delay the disclosure of records or information until the investigating agency determines whether the use of force violated a law or agency policy, but no longer than 180 days after the date of the employing agency's discovery of the use of force, or allegation of use of force, by a person authorized to initiate an investigation, or 30 days after the close of any criminal investigation related to the peace officer or custodial officer's use of force, whichever is later.

(8) A record of a civilian complaint, or the investigations, findings, or dispositions of that complaint, shall not be released pursuant to this section if the complaint is frivolous, as defined in Section 128.5 of the Code of Civil Procedure, or if the complaint is unfounded.

The legal issue presented in these six cases is whether, and to what extent, this new subdivision (b) applies to police personnel records created prior to SB 1421's enactment date – that is, in 2018 or earlier. The Unions contend that the new subdivision applies only to police

personnel records created in 2019 or later. Thus, they contend that any 2018-or-earlier documents are not subject to release or inspection under the PRA, notwithstanding SB 1421.[4] Intervenors contend, to the contrary, that the new statute applies to any "peace officer or custodial officer personnel records and records maintained by any state or local agency" in 2019 or later, regardless of when any particular record was created. That is the issue to be decided now.

For convenience, the Court will use the phrase "pre-2019 personnel records" to refer categorically to documents that would otherwise be subject to PRA disclosure under the new § 832.7, but that are contended to be exempt from it because the documents were created prior to 2019.

THESE SIX CASES, THEIR PARTIES, AND THEIR PRIOR PROCEEDINGS

These six cases were all filed by the same attorneys on January 22 or 24, 2019. The alignment of parties in each case is parallel:

- The petitioner in each case is a police union, acting as the collective-bargaining union for the officers of a local law enforcement agency (collectively "Unions"). The agencies involved are the police departments of Walnut Creek, Concord, Martinez, Richmond, and Antioch, and the Contra Costa Sheriff's Office.[5]

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[4] The Unions' contention is actually a little broader than stated here. They contend that SB 1421 is inapplicable not only to police personnel *records* created before 2019, but also to records (whenever created) that pertain to *events* occurring before 2019. Thus (as an illustrative hypothetical) if there were an officer-involved shooting in December 2018, but the investigation of the shooting continued into January 2019, the Unions would contend that a 2019 investigation report would not be disclosable under the new PRA provision. At the ex parte hearings the Court expressed some skepticism of this extension of the Unions' theory, noting that § 832.7 operates in terms of covered records, not covered events. Because the Court is now ruling that the new § 832.7(b) covers police personnel records regardless of dates, however, the Court need not separately discuss this addendum to the Unions' contentions.

[5] There was reportedly one other parallel case filed involving El Cerrito, but the Unions' counsel advised the Court that that case was dismissed voluntarily.

- The named respondents are the municipalities operating the law enforcement agencies in question, and their chiefs of police (or, in the County's case, the Sheriff) (collectively the "Agencies"). Two of them (Walnut Creek and Richmond) have filed responses to the present OSC re preliminary injunction, very briefly stating their agreement with the position of the requesters/intervenors. The remaining four agencies have filed written responses taking no substantive position pro or con.
- The substantive opposition to the preliminary injunctions comes from several Intervenors, all entities (and one individual) who have made PRA requests to the various agencies involved. The Court has granted each of them leave to intervene, and they have filed formal complaints in intervention in each case. For purposes of legal representation and briefing, they have grouped themselves into two sets: (1) the ACLU of Northern California, along with an individual requester in the Richmond case (collectively "ACLU"), and (2) a collection of jointly represented media entities[6] (collectively the "Media Intervenors"). These two groups have filed separate briefs in opposition to preliminary injunctions, but their arguments and positions are similar and harmonious (except that the Media Intervenors also make several collateral arguments not raised by the ACLU).

On January 24 (in the Walnut Creek case) and January 25 (in the remaining cases), the Unions appeared ex parte to seek temporary restraining orders preventing the Agencies from releasing pre-2019 personnel records.[7] The Court granted the TROs principally on the basis that any release of the pre-2019 personnel records at issue, before full consideration of the merits of

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[6] The First Amendment Coalition; California Newspapers Partnership LP; KQED Inc.; Investigative Studios, Inc.; and the Center for Investigative Reporting.

[7] The cases were all assigned to Department 12 by the Civil Supervising Judge so that they could be briefed and decided together. They have not been formally consolidated, however.

these cases, would effectively be irretrievable. Once the records are released to the public in general (and the media in particular), there will be no putting them back in the bottle. Conversely, although Intervenors appeared in opposition at the January 25 ex parte hearing and the Court expressly inquired if anyone wanted to say anything about the balance of hardships, no one asserted that there would be any irreparable harm on the other side – no immediate and urgent need to obtain the pre-2019 personnel records between the TRO date and today's hearing date. The Court set the present date (with as short a turn-around time as was reasonably practical) for hearing on the OSCs for preliminary injunctions. The attorneys have been commendably diligent in working with the shortened schedule.

WHAT IS NOT INVOLVED IN THESE CASES

Before turning to the substance of these cases, it may assist readers to note briefly what these cases are *not* about.

First, except as to the chronological issue of 2019 documents versus pre-2019 documents, these cases present no issues about whether any particular documents (or sets of documents) do or don't fall within the scope defined in the new § 832.7. Such issues may arise in the future, document by document or request by request, but they are not presented in these cases.

Second, the Unions make no argument that the Legislature was without power to apply the new PRA requirements to pre-2019 documents, if it saw fit to do so. There are no arguments, for example, along the lines that police officers had any kind of "vested right" to privacy under the prior § 832.7, of which they could not be deprived by superseding legislation. The Unions concede that the Legislature could have done that; they argue only that the Legislature did not do that.

Third (and related), these cases do not present any plausible argument that the records covered by the new § 832.7(b) would be subject to any freestanding claim of privacy, independent of the statutory force of the prior § 832.7. The Unions argue that pre-2019

personnel records retain their confidentiality because the Legislature conferred such confidentiality on them in the prior statute, and the force of that statute continues to apply. But (as the Unions' counsel informally acknowledged at the first ex parte hearing), if we pretended for a moment that there had never been a § 832.7, there would be no respectable argument that the documents now at issue should have been treated as confidential or subject to officers' rights of privacy, based on the character of the documents themselves. Even a brief perusal of subdivision (b)(1) suffices to demonstrate that the records now subject to PRA disclosure directly involve matters of legitimate public concern and scrutiny: officer-involved shootings, officers' use of force resulting in death or serious injury, allegations of sexual assault by an officer, allegations of on-duty dishonesty, and so on. The only arguable exception to this might be incidents of officers committing sexual assault off the job (see § 832.7(b)(1)(B)). But even there, the statute applies only to "sustained finding[s]" of such assault, not to unfounded accusations. It is surely a legitimate topic of public interest to know if a police officer has been determined to be a sexual assailant, even if the assault occurred in his or her private life.

Fourth, these cases do not require this Court to engage in any weighing or comparison of the competing public policies of protection of officer privacy interests, on one hand, versus disclosure to the public of potential police misconduct, on the other. Balancing those two public interests against each other is the business of the Legislature, not the courts. (See, e.g., *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1298-99.) The Legislature struck that balance one way in the prior version of § 832.7. It has now struck the balance differently in SB 1421. As to both versions of the statute it is the job of this Court, not to second-guess or reweigh the Legislature's judgment, but to identify and enforce it. The Court must strive to ascertain what the Legislature's commands were or are, including locating the proper boundary between the old command and the new one.

STANDARDS GOVERNING GRANTING OR DENYING PRELIMINARY INJUNCTIONS

The legal standards governing issuance of a preliminary injunction are familiar and uncontroversial. The ruling on an application for preliminary injunction rests in the sound discretion of the trial court. *Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1450. "An injunction properly issues only where the right to be protected is clear, injury is impending and so immediately likely as only to be avoided by issuance of the injunction." *Korean Philadelphia Presbyterian Church v. California Presbytery* (2000) 77 Cal.App.4th 1069, 1084. The burden is on the Unions, as the moving party, to show all elements necessary to support issuance of a preliminary injunction. *O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1481. "In deciding whether to issue a preliminary injunction, a trial court weighs two interrelated factors: the likelihood the moving party ultimately will prevail on the merits, and the relative interim harm to the parties from the issuance or nonissuance of the injunction." *Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1449. In deciding whether to issue the injunction, the court must also evaluate "the interim harm that the plaintiff would be likely to sustain if the injunction were denied as compared to the harm the defendant would be likely to suffer if the preliminary injunction were issued." *Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 749.

Here (as the Court informally commented at the time of the ex parte applications), the balance of potential interim hardships tips strongly toward the Unions. If preliminary injunctions are denied, and the Agencies accordingly make pre-2019 personnel records available in response to the pending PRA requests, the records will irretrievably lose the confidentiality and privacy protection to which (the Unions argue) they are entitled. As a practical matter the cases will be effectively moot, at least as to the materials requested in the pending PRA requests (which are very broad).

On the other side of the balance, the Court does not mean to make light of the legitimate interests of Intervenors in obtaining prompt compliance with their PRA requests. It does not follow, however, that they will suffer irreparable injury if they do not obtain the requested documents *immediately* – meaning between now and final judgment.[8] No such assertion or showing of harm from interim delay has been made.

This is not the typical preliminary injunction case, however, where consideration of the merits is truly only a prediction as to the ultimate outcome – and hence one must also consider the balance of hardships. There are no disputed fact issues presented in any of these cases that would require any trial, evidentiary hearing, or even discovery. Rather, everyone involved in the cases is treating the present hearing as, in practical effect, a full-blown and plenary consideration of the merits of the dispositive legal issue presented. Although it has been accelerated, the briefing has also been complete and capably presented all around.

Accordingly, the Court views its legal rulings below not as a tentative prediction of the ultimate outcome, but as its ruling on the merits of the legal question. The Court is holding – not taking a tentative view, or predicting, but holding – that the Unions' contention is legally unmeritorious, and the Unions are not entitled to an injunction or any other form of relief.

That effectively removes the balance of interim hardships from the equation. There are no interim hardships because there is no interim. The Court is not saying that the Unions' claims are insubstantial, or their arguments frivolous. The Court is holding, however, that those claims are unmeritorious as a matter of law. Necessarily, then, the Court is concluding as a matter of law that the Unions have no probability of success on the merits. In that circumstance, the cases fall within the rule that "[a] trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately

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[8] Or, more realistically, between now and the Court of Appeal's decision in the appeal that will surely follow from this ruling.

prevail on the merits of the claim." *Butt v. State of California* (1992) 4 Cal.4th 668, 678; accord, e.g., *Jamison v. Dept. of Transportation* (2016) 4 Cal.App.5th 356, 362; *American Academy of Pediatrics v. Van de Kamp* (1989) 214 Cal.App.3d 831, 838.[9]

This reality, that today's decision represents the Court's final legal decision, was well reflected in today's oral argument. The Unions and the Intervenors both argued, ardently and well, about who should win the dispute over what § 832.7 now means. But no one mentioned anything about any balance of harms, including the "interim harm" that would be suffered by the Unions' members.

THE UNIONS' STANDING AS PETITIONERS

The Media Intervenors briefly raise an initial legal attack on the Unions' petitions in their entirety. They argue that whatever privacy rights are being asserted would belong to individual police officers (the Unions' members), not to the Unions as such. They therefore argue that the Unions lack standing to assert their members' rights. The contention is pertinent here because it goes directly to the Unions' probability of prevailing on the merits – indeed, to their right to bring these actions at all. No matter how forceful or correct their legal arguments and claims might be, the present petitions must fail if there are no petitioners with standing to assert those arguments and claims. And if that were so, the Unions would also lack standing to seek preliminary injunctions, and would have no chance of success on the merits.[10]

The Court, however, must reject the Media Intervenors' standing argument.

The Media Intervenors argue that the Unions lack standing because they are asserting the privacy rights of individual peace officers, and privacy rights are personal and thus can only be

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[9] The Court acknowledges that the situation may appear otherwise when these cases first come to the Court of Appeal, which (at that point) will not yet have decided the dispositive legal issue. That, however, is that Court's call, not this Court's.

[10] When this argument was raised at the ex parte hearing on January 25, the Court inquired whether the Unions might consider adding one or more individual officers as petitioners. The Unions have declined to pursue that possibility.

asserted by individual peace officers. A very similar argument was raised, and squarely rejected, in *Long Beach City Employees Assn. v. City of Long Beach* (1986) 41 Cal.3d 937, 941. There a public employer ordered employees to submit to polygraph examinations in an effort to stop theft. The association opposed this order on behalf of the employees, arguing they had a constitutional right of privacy not to submit to the examinations. The court apparently thought the issue of standing was clear enough that it did not even merit discussion in the body of the opinion. In a footnote, the court said:

> Defendants contend that CEA has no standing to assert the privacy rights of the employees it represents. We reject this contention. The instant lawsuit comes well within the scope of representation under the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.). The fact that personal privacy rights are involved is no bar to a representational suit of this kind.

41 Cal.3d at 941-42 n.3.

The two cases cited by the Media Intervenors, by contrast, did not involve any such situation. *Rental Housing Owners Assn. of Southern Alameda County, Inc. v. City of Hayward* (2011) 200 Cal.App.4th 81, did not involve any employee organization at all. *Association for Los Angeles Deputy Sheriffs v. Los Angeles Times Communications LLC* (2015) 239 Cal.App.4th 808, 821, did involve a police union seeking to assert the privacy rights of its member officers. Critically, however, the defendant being sued was a newspaper, not the officers' own employing agency. That necessarily takes the *Los Angeles Deputy Sheriffs* case out of the ambit of the Meyers-Milias-Brown Act, and the *Long Beach* court's application of it.

FIRST AMENDMENT ARGUMENTS

The Media Intervenors argue that a preliminary injunction forbidding the Agencies from releasing any pre-2019 personnel records would constitute an unconstitutional prior restraint in violation of the First Amendment. The argument is unconvincing.

The Media Intervenors cite two cases as establishing that news media have standing to litigate the validity of restraints on speech, even though they are the audience rather than the

speaker.[11] In both of those cases, however, there were willing speakers involved – people who, but for the attacked restraints, were apparently eager to speak the speech that the media desired to hear. The cases do not stand for the proposition that the media have standing to assert the First Amendment rights of people or entities who don't desire to speak.

The latter describes the situation here. Two of the Agencies have indicated that they agree that the current version of § 832.7(b) authorizes and requires them to release the requested material, and the other Agencies have indicated expressly or by implication that they intend to comply with Intervenors' PRA requests unless this Court grants the Unions' preliminary injunction requests. None of them, however, has indicated or even hinted that it intends to release any pre-2019 personnel records on any basis other than compliance with the PRA, as authorized by § 832.7(b). (The Court asked them that at argument, and no one spoke up to the contrary.) In other words, no Agency has indicated any interest in releasing these documents as a matter of the Agency's own volitional speech. The Agencies are willing to comply with the law, as the courts determine the law to be; and two of them have their own view as to what the law is. But no Agency is asserting or suggesting that it wants or intends to release these documents to anyone as an exercise of its own free speech. If (as the Unions urge) the Court were to conclude that the PRA does not require or authorize any such release, all of these Agencies would surely be equally willing to comply with that legal dictate.

The Media Intervenors' argument, carried to its full logic, seems to suggest that anytime someone contends that a state statute compels a government agency to say or publicize something, a court would be violating the First Amendment if it rejects the contention and holds that the statute doesn't require any such statement or publicity – on the rationale that if the court ruled the other way, the agency would perforce be speaking. That can't be the law.

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[11] *CBS, Inc. v. Young* (6th Cir. 1975) 522 F.2d 234; *Connecticut Magazine v. Moraghan* (D.Conn. 1987) 676 F.Supp. 38.

The Media Intervenors' argument also overlooks the principle that whatever right of confidentiality is created by § 832.7 has been held to belong *both* to the employing agency *and* the individual officer. *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1430-31. Thus, contrary to Media Intervenors' unspoken premise, it is not the case that the Agencies here would be free to release these pre-2019 personnel records as a matter of their own volitional speech, even if such release is not authorized by § 832.7. If the Unions are right in arguing as a statutory matter that § 832.7 forbids release of pre-2019 personnel records, the Court would not violate the First Amendment by so ruling, and enjoining such release.

RIPENESS

Having posited without support that the Agencies are eager to release these pre-2019 personnel records in the exercise of their own First Amendment rights, the Media Intervenors turn around and argue next that three of the six present cases are not ripe because there is no indication that the Agencies intend to release any pre-2019 personnel records if not enjoined. Indeed, the Media Intervenors go so far as to question whether those Agencies even possess any responsive pre-2019 personnel records.

The assertion on the latter point is difficult to take seriously as a factual matter. Everyone involved here, starting with the Intervenors' own PRA requests and continuing with their complaints in intervention, takes for granted that these Agencies possess and maintain pre-2019 personnel records that would be responsive to these PRA requests. No Agency has responded to either the PRA requests or these lawsuits by asserting, "Nope, we don't have any of those."

The argument on the former point is a little more substantial, but only a little. The several Agencies involved in these cases have stated their initial positions on the PRA requests with various levels of certainty and precision. All of them, however, have indicated or at least implied that they are considering whether to release pre-2019 personnel records, depending on

what this Court ends up ruling. None has stated, or even hinted at, any intention of *withholding* pre-2019 personnel records on the ground that SB 1421 does not apply to pre-2019 personnel records. If not enjoined, then, it is reasonable to expect that they will proceed with full production in response to the pending PRA requests. Again, the Court asked this question at oral argument, and all the Agencies present confirmed what the Court had assumed: They will comply with the Court's ruling in whichever direction it goes. But if not enjoined, they do intend to produce pre-2019 personnel records, because it appears that such production is required by the new statute.

The Court adds the observation that if perchance the Media Intervenors were right that any of these Agencies will be withholding pre-2019 personnel records with or without this Court's preliminary injunction, then by hypothesis there would be no real harm in the Court enjoining them from doing what (hypothetically) they don't want or plan to do anyway. The risk that the Media Intervenors' ripeness argument invites, however, is that the Court might guess wrong about the Agencies' intentions. If the Court were to deny a preliminary injunction on the sole ground that there is no showing that an Agency intends to release pre-2019 personnel records, the Agency might then immediately release the records because there is no injunction against it – and might do so without further warning to the Unions, or without leaving them enough time to return to court for a new TRO.

THE STATUTORY MERITS, PART 1: DOES SB 1421 APPLY RETROACTIVELY?

Analysis in the case law of whether a newly enacted statute should be applied "retroactively" (or "retrospectively") tends to proceed in two steps, with the first step often being rather easier than the second. The first question is whether there is any indication in the text of the statute (or, sometimes, from external sources such as legislative history) that the Legislature intended the statute to apply retroactively. If the answer to that question is "no" (which is

usually the case), however, the courts must then go on to look at whether a particular proposed application of the new statute does or does not constitute "retroactive" application. *Tapia v. Superior Court* (1991) 53 Cal.3d 282, for example, illustrates the analytical method. At issue there was whether various provisions of Proposition 115 should or should not be applied in cases alleging crimes committed before the Proposition's effective date. It took the California Supreme Court took less than half a page, and little effort, to conclude that the Proposition was not intended to operate retroactively. 53 Cal.3d at 287. The remaining thirteen pages of the court's opinion then turned to the knottier problems of whether applying various particular provisions to cases of pre-enactment offenses would or would not constitute "retroactive" application, reaching mixed results. Id. at 288-302.

Taking up the first question first: There are many precedents discussing whether a new enactment should be construed as applying retroactively, all saying more or less the same thing. A recent example from the California Supreme Court lays out the legal framework:

> Our decisions have recognized that statutes ordinarily are interpreted as operating prospectively in the absence of a clear indication of a contrary legislative intent. In construing statutes, there is a presumption against retroactive application unless the Legislature plainly has directed otherwise by means of express language of retroactivity *or* … other sources [that] provide a clear and unavoidable implication that the Legislature intended retroactive application. Ambiguous statutory language will not suffice to dispel the presumption against retroactivity; rather a statute that is ambiguous with respect to retroactive application is construed … to be unambiguously prospective.

Quarry v. Doe I (2012) 53 Cal.4th 945, 955 (internal quotations and citations omitted).

Through this unforgiving lens, it is readily seen that the Unions are right in saying there is no basis for construing SB 1421 as commanding retroactive application. The statute itself says not a word about whether it should be applied retroactively. Intervenors argue that various particular words or phrases in § 832.7 (such as "maintained", "any", and "shall") are proof that retroactivity is intended. In the following section of this decision the Court agrees with Intervenors' arguments that those words (among other indications) show that Intervenors'

proposed reading of SB 1421 does not constitute a "retroactive" application of it. But at this first stage of the analysis, another way of phrasing that same point is that those words do not compel the inference that the statute is to be applied retroactively. Neither is there anything in the legislative history that even suggests retroactive application, let alone compelling it with the clarity that *Quarry* and like cases would require.[12]

THE STATUTORY MERITS, PART 2:
WHAT WOULD CONSTITUTE "RETROACTIVE APPLICATION" HERE?

That's the easy part. As *Quarry* went on to discuss, however, the more difficult issue is sorting out whether a particular invocation of a new statute does or doesn't constitute retroactive application.

> The terms "retroactive" and "prospective," however, are not always easy to apply to a given statute. We must consider the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. In exercising this judgment, familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.
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> In general, a law has a retroactive effect when it functions to change[] the legal consequences of past conduct by imposing new or different liabilities based upon such conduct … that is, when it substantially affect[s] existing rights and obligations. In general, application of a law is retroactive only if it attaches new legal consequences to, or increases a party's liability for, an event, transaction, or conduct that was *completed* before the law's effective date. Ordinarily, considerations of basic fairness militate against such retroactive changes.
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> Changes to the law, however, are not necessarily considered retroactive even if their application involve[s] the evaluation of civil or criminal conduct occurring before enactment. In a principle of significance to the present case, changes to rules governing *pending litigation*, for example, frequently have been designated as prospective, because they affect the future; that is, the future

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[12] The only morsel of legislative history proffered on this topic is a criticism from an opponent of the bill, complaining that it would appear to require PRA production of police personnel records dating back to before enactment. But in the first place, a single comment from an opponent is hardly a reliable indicator of what the bill's proponents thought it would do. It is all too common for opponents to predict, in various forms and with varying degrees of credibility, how the sky will fall if this bill passes. And in any event, the result the commenter was deploring – application of the new law to pre-2019 personnel records – is exactly the result the Court is reaching, not because the new law applies retroactively, but because this isn't a retroactive application.

> proceedings in a trial. The prospective label applies even though the trial concerns conduct that occurred prior to the enactment of the new law.

53 Cal.4th at 955-56 (internal quotations and citations omitted); and see, e.g., *In re E.J.* (2010) 47 Cal.4th 1258, 1273-74; *Elsner v. Uveges* (2004) 34 Cal.4th 915, 936-37; *People v. Grant* (1999) 20 Cal.4th 150, 157.

The recent case law has focused on three key considerations in deciding whether a new law is being applied retroactively or prospectively: (1) whether the facts triggering application of the new law are events occurring before or after its effective date; (2) whether the new law alters the substantive consequences of prior actions, such as by imposing or increasing someone's liability for acts occurring before enactment; and (3) whether there have been acts done in reasonable reliance on the previous state of the law, such that it would be unfair to subject the actors to new law. These three factors are closely related to each other, and they overlap analytically to a large extent. The Court will discuss them in order. All three of them favor the conclusion that applying the new § 832.7(b) to pre-2019 personnel records constitutes a prospective application of the new statute, not a retroactive application.

1. When the Operative Events Occurred.

The consideration most closely tied to the actual statutory language is whether the new statute is triggered by events occurring after the effective date. In *In re E.J.*, 47 Cal.4th 1258, for example, the issue was whether a newly enacted provision, restricting the permissible residence locations of registered-sex-offender parolees, applied to parolees whose offenses were committed before the new restrictions were enacted. The court held that the restrictions did so apply, because the key operative fact – the conduct to which the restrictions were being applied – was not the original offenses, but the parolees' post-enactment choices of residence. "[T]he critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date. A law is not retroactive merely because some of the facts or conditions upon which its application depends

came into existence prior to its enactment." 47 Cal.4th at 1273-74 (citations and internal quotations omitted).

Similarly, in *People v. McClinton* (2018) 29 Cal.App.5th 738, 753, the court held that a new statute governing access to mental health records should be applied to the discovery and trial in a sexually-violent-predator case, even though the records at issue dated to back before the effective date of the new statute. "The statute plainly applies to SVP proceedings that were to occur after January 1, 2016. In this case, the People's [subpoenas], the disclosure of McClinton's … mental health records …, and the SVP retrial all occurred after January 1, 2016. Thus, section 6603(j) was applied prospectively, not retroactively." Id.[13]

More broadly, new statutes that change the rules of evidence and procedure for cases are routinely held applicable to the future conduct of cases and trials that relate to past events, because the events on which the new law operates are the conduct of the trials, not the past events giving rise to the trials.

> [The rule against retrospective application] does not preclude the application of new procedural or evidentiary statutes to trials occurring after enactment, even though such trials may involve the evaluation of civil or criminal conduct occurring before enactment. [Citation.] This is so because these uses typically affect only future conduct – the conduct of the trial. "Such a statute is not made retroactive merely because it draws upon facts existing prior to its enactment…. [Instead,] [t]he effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future. [Citations.] For this reason, we have said that it is a misnomer to designate [such statutes] as having retrospective effect."

Elsner, 34 Cal.4th at 936, quoting *Tapia*, 53 Cal.3d at 288.

In *Kizer v. Hanna* (1989) 48 Cal.3d 1, the new enactment at issue required a decedent's estate to reimburse Medi-Cal payments. The court held that the law could be applied prospectively to require reimbursement of payments received before the law's effective date,

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[13] For a similar result, although in a different procedural posture and additional legal reasoning, see *People v. Superior Court (Smith)* (2018) 6 Cal.5th 457, decided two weeks after *McClinton*.

because the operative fact giving rise to the obligation of reimbursement was the decedent's post-enactment death, not the decedent's pre-enactment receipt of benefits. But by contrast, a new statute altering calculation of disability benefits could not be applied to disabilities arising from pre-existing injuries, because the operative fact giving rise to the right to benefits was the pre-amendment injury, not the post-amendment disability. *Aetna Casualty & Surety Co. v. Industrial Accident Comm'n* (1947) 30 Cal.2d 388.

Here, the challenged application of the new statute is the requirement in § 832.7(b)(1) that specified police personnel records "shall not be confidential and shall be made available for public inspection pursuant to" the PRA. The operative facts triggering this obligation of disclosure are neither the underlying police conduct, nor the creation of personnel records about that conduct. The requirement that the police agency must make the records available under the PRA arises from two facts: first, the fact that the agency "maintain[s]" the records – meaning, that it maintains them at the time of the PRA request. And second, that the PRA request is made after the new statute has taken effect. Section 832.7 does not require an agency to produce records in 2019 that it does not "maintain" in 2019. And it does not require an agency to produce any records at all, until a PRA request for them is made – again, in 2019.

The Unions err in arguing that the operative facts to be considered are the underlying police conduct, and the agency's investigation and records of that conduct. In the language of the *In re E.J.* decision, that constitutes "some of the facts or conditions upon which its application depends [coming] into existence prior to [the new law's] enactment." 47 Cal.4th at 1274. But neither the pre-2019 conduct nor the pre-2019 records, by themselves, would have given rise to any obligation whatsoever that the records be made available under the PRA. That result follows only from the making of a PRA request in 2019.

The Unions' argument puts words into the statute that the Legislature did not put there. The Legislature said that certain police personnel records "maintained" by police agencies "shall

not be confidential and shall be made available for public inspection pursuant to" the PRA. "Maintained" means "maintained at the time the request is made". The Legislature did not say, "maintained now and created only after 2018". Neither did the Legislature state any date-based exemption from the unqualified statement that those documents "shall not be confidential and shall be made available". The text of the new § 832.7(b) does not support inserting such major restrictions into what the Legislature has otherwise provided.

What, then, would constitute a retroactive application of SB 1421? It would be improperly retroactive to apply the new law to an old PRA request. Suppose a PRA request for pre-2019 personnel records was made in (say) November 2018, and denied by the agency in December 2018 because the then-existing version of § 832.7 did not authorize or require PRA production of those records. That denial was perfectly lawful – indeed, legally mandatory – at the time it was made. If a lawsuit seeking to compel production came up for court decision in January 2019, it would be impermissibly retroactive for the court to order production based on the new version of the statute.

2. Altering the Substantive Consequences of Pre-Enactment Actions.

A second (and related) major consideration is whether application of a new enactment to prior facts would have the result of changing the substantive consequences of prior actions, such as by imposing new legal liability on acts that were subject to no such liability at the time they occurred.

> Having articulated the presumption [against retroactive application], [t]here remains the question of what the terms "prospective" and "retroactive" mean. In deciding whether the application of a law is prospective or retroactive, we look to function, not form. We consider the effect of a law on a party's rights and liabilities, not whether a procedural or substantive label best applies. Does the law change[] the legal consequences of past conduct by imposing new or different liabilities based upon such conduct[?] Does it substantially affect[] existing rights and obligations[?] If so, then application to a trial of reenactment conduct is forbidden, absent an express legislative intent to permit such retroactive application. If not, then application to a trial of preenactment conduct is permitted, because the application is prospective.

Californians for Disability Rights v. Mervyn's, LLC (2006) 39 Cal.4th 223, 230-31 (internal quotations and citations omitted).

Elsner illustrates the distinction. The court held that there was it was not retroactive to apply certain newly enacted statutes concerning workplace safety, because even before they were enacted, the common law already imposed substantially the same duties on the employer. 34 Cal.4th at 937-38. But it reached the opposite result as to application of different new rules that might impose stricter responsibilities than the pre-existing common law. Id. at 938.

The *Disability Rights* opinion drew heavily on *Elsner*, and added several explanatory examples from other case law. 39 Cal.4th at 231-32. It has been held retroactive to subject tobacco sellers to tort liability for conduct that, at the time it occurred, was immunized by a (subsequently repealed) statute.[14] It was likewise retroactive to subject persons to increased punishment for past criminal conduct, or to punishment for past conduct not formerly defined as criminal.[15] But by contrast, it was prospective to require plaintiffs using a new environmental law to provide a certificate of merit;[16] to eliminate the right to dismiss certain public-interest lawsuits;[17] and to eliminate a right of appeal from certain decisions.[18] "In each of these cases, application of the new law to pending cases properly governed the conduct of proceedings following the law's enactment without changing the legal consequences of past conduct." 39 Cal.4th at 231-32.

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[14] 39 Cal.4th at 230, citing *Myers v. Philip Morris Cos.* (2002) 28 Cal.4th 828.

[15] 39 Cal.4th at 230, citing *Tapia*, 53 Cal.3d at 297-99.

[16] 39 Cal.4th at 230, citing *In re Vaccine Cases* (2005) 134 Cal.App.4th 438.

[17] 39 Cal.4th at 230, citing *Brenton v. Metabolife Internat., Inc.* (2004) 116 Cal.App.4th 679.

[18] 39 Cal.4th at 230, citing *Landau v. Superior Court* (1998) 81 Cal.App.4th 191.

In *Disability Rights* itself, the court held that it was prospective to apply, to a pending appeal, a new statute limiting standing under the Unfair Competition Law to those injured by the asserted unlawful conduct. It was key, the court said, that the new law had no effect at all on what was lawful or unlawful conduct.

> To apply Proposition 64's standing provisions to the case before us is not to apply them "retroactively," as we have defined that term, because the measure does not change the legal consequences of past conduct by imposing new or different liabilities based on such conduct. The measure left entirely unchanged the substantive rules governing business and competitive conduct. Nothing a business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted. Nor does the measure eliminate any right to recover. Now, as before, no one may recover damages under the UCL, and now, as before, a private person may recover restitution only of those profits that the defendant has unfairly obtained from such person or in which such person has an ownership interest.

39 Cal.4th at 232 (citations omitted).

Similarly in *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 356-57, the court held that the then-new anti-SLAPP statute applied to causes of action accruing before its effective date. "Section 425.16 does not change the legal effect of past conduct. It merely is a procedural screening mechanism for determining whether a plaintiff can demonstrate sufficient facts to establish a prima facie case to permit the matter to go to a trier of fact." Id. at 356.

Here, there is nothing whatsoever in SB 1421 that changes the legal consequences for police officers (or police agencies) of their pre-2019 conduct. SB 1421 criminalizes no conduct that was not criminal in 2018. It creates no legal claim or cause of action that did not exist in 2018. It establishes no new principles of employment or administrative rules that did not exist in 2018. It does not even change the procedures by which alleged police misconduct is to be investigated, administratively adjudicated, sued on in court, or criminally prosecuted. In every respect, the law applicable to all those things is exactly the same as it was before SB 1421 was enacted – or, at least, if it has coincidentally changed, it was not SB 1421 that changed it. To

paraphrase *Disability Rights*, "Nothing a [police officer] might lawfully do before [SB 1421] is unlawful now, and nothing earlier forbidden is now permitted."

So what has changed? Only who can find out the facts and obtain the evidence of incidents of police conduct (whether it is misconduct, as in sexual assaults, or conduct that may be lawful or unlawful, as in officer-involved shootings). Providing information to people who could not previously get it is not changing the substantive legal effect of prior acts.

Revealing police personnel records that were previously kept confidential may, of course, result in officers being held accountable (officially or unofficially) in ways that might not have occurred before SB 1421. For example, it may enable tort or civil-rights plaintiffs to proceed with lawsuits that would have been impractical without this access to evidence. It may result in criminal prosecution or administrative discipline of officers, if it gives citizens or the media the ammunition to pressure prosecutors or chiefs of police. And even if nothing occurs differently in an official setting, it may result in officers being held responsible in the proverbial court of public opinion. Conversely, we should not assume that all new revelation of pre-2019 personnel records will necessarily redound to the officers' disadvantage. In some cases, the result may be to allow the media and the public to see exculpatory facts and findings that would have been withheld from them under the previous version of § 832.7.

None of that, though, constitutes the kind of legislative change of liabilities for past conduct contemplated by *Elsner*, *Myers*, *Disability Rights*, and similar precedents. Assume a hypothetical police officer commits an act of unjustified and unlawful police brutality. Assume further that before 2019, he would have escaped external scrutiny for that act because § 832.7 prevented his employing agency from disclosing its investigation, and effectively allowed the agency to hush the matter up. Now, by hypothesis, the agency's investigation into the incident can be requested under the PRA. That, however, is not a change in the substantive legal consequences of the officer's act. Police brutality was just as illegal in 2018 as it is in 2019. All

that has changed is an increased chance that illegal or improper conduct will come to public light, and that legal and proper conduct will be better shown to the public as being legal and proper.

The Unions argue forcefully that SB 1421 does change pre-existing rights and liabilities in one respect: It effectively takes away the rights of confidentiality that officers had under the previous version of § 832.7. But that tends to assume its own conclusion, in terms of the verb tenses used and when those rights were in force. It is true (as dicta in several court decisions remarked) that officers *had* rights to privacy in the personnel records covered by the prior version of § 832.7, because the Legislature said so. But they do not now *have* those rights, because again the Legislature says so.

As noted above, the Unions do not contend that their members have any kind of constitutionally vested right (independent of current statutes) in the confidentiality of any personnel records. Further, as noted above, there is no plausible argument that any of the police personnel records now made available under SB 1421 were anything as to which police officers would have had any personal rights of privacy, *except* to the extent that the prior statute made those records confidential. But what the Legislature gives, it can take away. Those records were confidential in 2018 because the Legislature said they were. But now the Legislature says they *are not* confidential. It has mandated that "the following peace officer or custodial officer personnel records and records maintained by any state or local agency *shall not be confidential* and *shall be made available for public inspection*" (§ 832.7(b)(1), emphasis added).

The Unions invoke a formulation of the definition of retroactivity dating back to *American States W.S. Co. v. Johnson* (1939) 31 Cal.App.2d 606, 613, to the effect that a retroactive law is one that "affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute." The Unions of course stress the word "rights" in this formulation, noting that before SB 1421 their members were often said to have

rights to the confidentiality of their personnel records. But any focus on statutorily created "rights" as a separate and determinative factor in the analysis was soundly rejected by the California Supreme Court in *Tapia*, 33 Cal.3d at 291-92. The phrase has been occasionally repeated in passing in subsequent case law, but it has ceased to provide a meaningful and distinct rule of decision. Nowadays, when the courts speak of pre-existing "rights" as a consideration in whether a statute is being applied retrospectively or prospectively, they mean changes in the substantive *legal consequences* of past actions. Casting public light on police actions does not fit that criterion.

3. Reliance on Prior Law.

Finally, in deciding whether an application of a newly enacted statute should be classed as retroactive or prospective, the courts have looked at whether there was any substantial and legitimate reliance on the prior state of the law, such that applying the changed law would be unfair. Obviously this consideration may apply to changes in substantive legal consequences, as discussed in the preceding section. But even where the new statute does not announce a new and different standard of lawful conduct, there may still have been a justifiable reliance on the prior law.

In *Quarry*, 53 Cal.4th 945, for example, the question was whether new revisions to the statutes of limitations applicable to child-molestation cases could be applied to causes of action accruing before the new statute's effective date. The court drew a distinction between an amendment extending the limitations period on a cause of action not yet lapsed at the time of enactment, versus revival of causes of action that were already past limitations at the time of the new enactment. The latter, the court held, represented a retroactive application of the new limitations statute. Among its reasons for that holding was the observation that accused tortfeasors might well have relied on the lapsing of the statute of limitations, for example in deciding what records to keep, what evidence or facts to preserve, and so on. Id. at 957-58.

Again, in *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1205-06, the new statute at issue was Proposition 51, which substantially altered the tort-law landscape with respect to the proportional liability of co-tortfeasors. The court held that it was impermissibly retroactive to apply the Proposition to causes of action arising before its effective date. It reasoned that while of course no one suffers an injury accident "in reliance on" the pre-existing law of tort contribution, parties in pre-existing cases could well have made their decisions about whom to sue, and with whom to settle and for how much, in reliance on that law. To change the rules on them, after those decisions were made, was potentially to pull the rug out from under them.

So what would be the equivalent reliance interest at stake here? There are three plausible candidates: (1) including sensitive information (such as names of informants or crime victims) in investigative reports or the like, in reliance on those records being confidential; (2) officers or agencies doing things they wouldn't want to have publicly known, confident that their misdeeds (or whitewashes, etc.) would never come to light because of the prior statute's protection; and (3) officers declining to oppose or appeal disciplinary actions because the results would remain confidential.

The first two can be brushed aside quickly. The first one is addressed in the new statute itself, which includes detailed provisions for redacting or withholding information or documents in a variety of circumstances (§ 832.7(b)(5),(6),(7)). The Unions have not suggested that those provisions are insufficient in any way that would bear on the present question.

The second one was hypothesized by the Court, but understandably not posited by the Unions. No one asserts that this form of "reliance" – officers or agencies performing their duties in ways they would want to keep covered up – could be a legitimate form of justifiable reliance under the principles of *Quarry*, *Evangelatos*, or similar cases.[19]

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[19] The Court hastens to add that in hypothesizing such "reliance", it does not mean to suggest that it thinks such misconduct is the norm among police officers. But it must surely be supposed that at least some of it occurs at least some of the time.

The third possible form of reliance was raised for the first time at oral argument, and it is an argument that must be considered. Intervenors' counsel made the point that it is speculative to assume that an officer might have given up on resisting a form of internal discipline solely because he or she figured the black mark would remain confidential. That is speculative – but it is not really all that much more speculative than the California Supreme Court's speculation in *Evangelatos* that tort plaintiffs may have shaded their decisions on whom to sue and whom to settle with, in reliance on pre-Proposition 51 law; or its speculation in *Quarry* that accused child abusers or their employers might have purged records or stopped doing investigations in reliance on the running of the statute of limitations.

There is an important difference, though, between this hypothesized form of reliance by police officers, and the forms of reliance hypothesized in *Quarry* and *Evangelatos*. In those cases, the persons acting in reliance on prior law – tort plaintiffs in *Evangelatos*, tort defendants in *Quarry* – stood to suffer real, financial consequences as a result of their reliance on prior law. A tort plaintiff may have settled with a potential co-tortfeasor for less than he would have taken, had he known that Proposition 51 would come along – and having settled, the plaintiff cannot get that claim back. A potential child abuse defendant might find itself losing a suit because it no longer has the records that could have exonerated it.

Here, by contrast, the hypothetical officer who threw in the towel on a disciplinary proceeding does not stand to face any further discipline when the records of the proceeding become public. He or she stands to have to face adverse publicity. That's not nothing – but it's not as solid or real as the potential harms that swayed the court in *Quarry* and *Evangelatos*. This assertion of reliance is just not solid or credible enough to overcome the strong indications to the contrary – the statutory language, the fact that the new statute is triggered only by a post-enactment PRA request, and the absence of any effect on substantive consequences of past acts.

Finally, Intervenors point out that this result is in accord with the results and reasoning of cases in other states where similar issues have arisen. These courts have ruled that new laws, increasing the public's access to law enforcement or other records, must be applied to records dating back to before the new laws' enactment.[20]

CONCLUSION

The California Supreme Court has commented:

> The public's legitimate interest in the identity and activities of peace officers is even greater than its interest in those of the average public servant. Law enforcement officers carry upon their shoulders the cloak of authority to enforce the laws of the state. In order to maintain trust in its police department, the public must be kept fully informed of the activities of its peace officers. It is indisputable that law enforcement is a primary function of local government and that the public has a far greater interest in the qualifications and conduct of law enforcement officers, even at, and perhaps especially at, an "on the street" level than in the qualifications and conduct of other comparably low-ranking government employees performing more proprietary functions. The abuse of a patrolman's office can have great potentiality for social harm.

Comm'n on Peace Officer Standards & Training v. Superior Court (2007) 42 Cal.4th 278, 297-98 (internal quotations and citations omitted).

The Legislature, in enacting SB 1421, echoed those concerns.

> (a) Peace officers help to provide one of our state's most fundamental government services. To empower peace officers to fulfill their mission, the people of California vest them with extraordinary authority – the powers to detain, search, arrest, and use deadly force. Our society depends on peace officers' faithful exercise of that authority. Misuse of that authority can lead to grave constitutional violations, harms to liberty and the inherent sanctity of human life, as well as significant public unrest.

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[20] *State ex rel. Beacon Journal Publishing Co. v. University of Akron* (Ohio 1980) 415 N.E.2d 310; *State Org. of Police Officers v. Society of Professional Journalists* (Haw. 1996) 927 P.2d 386; *Mollick v. Township of Worcester* (Pa.Com.Ct. 2011) 32 A.3d 859 (county supervisors' e-mails); *Florida Hospital Waterman, Inc. v. Buster* (Fla. 2008) 984 So.2d 478 (records of adverse medical incidents); *Industrial Foundation of the South v. Texas Industrial Accident Bd.* (Tex. 1976) 540 S.W.2d 668 (worker's comp benefit records). The Unions have a point, however, that none of those cases involved arguments based on an affirmative statutory protection for confidentiality, such as is found in the prior version of § 832.7.

> (b) The public has a right to know all about serious police misconduct, as well as about officer-involved shootings and other serious uses of force. Concealing crucial public safety matters such as officer violations of civilians' civil rights, or inquiries into deadly use of force incidents, undercuts the public's faith in the legitimacy of law enforcement, makes it harder for tens of thousands of hardworking peace officers to do their jobs, and endangers public safety.

SB 1421, § 1.

It makes little sense to suppose that the Legislature saw these serious problems and concerns as applying strongly to police personnel records dating to 2019 – but that it viewed the same problems and concerns as categorically inapplicable to police personnel records dating to 2018 or earlier. Such a chronological distinction would make sense if, but only if, the Legislature thought that the police were entitled to conceal the records of their actions before this year. The text of the new statute says nothing to suggest that that is what the Legislature thought, and it makes very little sense to assume that that is what the Legislature meant.

Dated: February 8, 2019

Hon. Charles S. Treat
Superior Court Judge